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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~1210~~ 74

CLIFFORD TAGGART, ET AL.,
Appellants,

vs.

WEINACKER'S, INC.,
Appellee.

REPLY BRIEF TO BRIEF FILED IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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ADDITION TO STATEMENT OF FACTS

The order of the trial court granting the temporary injunction in this case is set out in Appendix D at page 29a of the Appendix to the Petition for Certiorari, the following is the verbatim enjoining part of the order:

> "These, therefore, are to COMMAND AND STRICTLY ENJOIN you, and each of you, from—TRESPASSING UPON THE PROPERTY OF THE COMPLAINANT *AND FROM FURTHER INTERFERING WITH THE COMPLAINANT'S PROPERTY*

AND RIGHT OF INGRESS AND EGRESS TO THE COMPLAINANT'S PROPERTY AND PLACE OF BUSINESS; until the further orders of this Court. And this you will in no wise omit under penalty, &c."

It is significant to note that the Court did not enjoin peaceful picketing of the premises, but merely enjoined trespassing upon the property of the Complainant and enjoined further interference with the Complainant's property and *right of ingress and egress and to the Complainant's property or place of business until the further orders of this Court.*

After the hearing on the merits was held the trial judge wrote a lengthy opinion (Appendix C at page 23a through 27a of the Petition for Certiorari). In this opinion is the finding of fact (Appendix C at page 24a of the Petition for Certiorari) that the picketing

> ". . . has been carried on in such a manner as to obstruct the customers of the Complainant in entering and leaving the entrances to said building on the south or Government Street side thereof."

BRIEF OF ARGUMENT AND REASONS FOR DENYING WRIT

In the case of *Youngdahl* v. *Rainfair*, 355 U.S. 131, 2 L.Ed.2d 151; 78 S.Ct. 206, this Court in affirming a portion of the injunction order of an Arkansas Court says at p. 157 of 2 Lawyers' Edition Second Series as follows:

> "Accordingly, insofar as the injunction before us prohibits petitioners and others cooperating with them . . . from obstructing or attempting to obstruct the free use of the streets adjacent to respondent's place of business, and the free ingress and egress to and from that property, it is affirmed."

It would therefore appear that on the basis of the *Youngdahl* v. *Rainfair* case that the portion of the Court's injunction order which enjoined the Respondent-Appellants

> "from further interfering with the Complainant's property and right of ingress and egress to the Complainant's property and place of business, ..."

was proper.

We should further like to point out that in the case of *Food Employees* v. *Logan Valley Plaza*, the opinion relied on by Appellants, the following statement by Mr. Justice Thurgood Marshall in Headnotes 8, 9, page 613 of 20 L. Ed.2d:

> "Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use of which the property is ordinarily put by the State. Thus we have upheld a *statute prohibiting picketing 'in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses'*. Cameron v. Johnson, 390 U.S. 611, 616, 20 L.Ed.2d 182, 187, 88 S.Ct. 1335."

It would therefore appear to Appellee that since the trial court found as a fact that the picketing was obstructing the ingress and egress to and from private premises even though the premises are those which the public is invited to come upon to trade, that the activity of obstructing the free ingress and egress is sufficiently reprehensible so as to destroy the implied invitation to come upon such property and to render the perpetrators of such acts trespassers after such perpetrators have been requested to desist and leave the premises.

As to the pre-emption question we submit as our Proposition of Law No. 1 which is based on six Sub-propositions of Law as follows:

Appellee submits that the only real issue insofar as the merits of this case are concerned is whether or not the State Court retains jurisdiction to enjoin trespassers by a labor union in connection with a labor dispute or whether this right has been pre-empted by acts of Congress or decisions of the Supreme Court of the United States.

Appellee submits that once this Court determines that the State Court had jurisdiction, then the remaining question as to whether or not an injunction was properly issued is strictly a factual one. The State of Alabama Supreme Court has previously held that the State Courts have the power to enjoin continuing trespasses against real property. The State of Alabama Supreme Court has likewise held that the grant or refusal of a temporary injunction rests in the sound discretion of the trial court, subject to being disturbed upon appeal only for abuse of discretion.

As we have stated heretofore in this brief our Proposition of Law No. 1 is a Proposition of Law which is made up from a number of recent Federal and State cases. We have set out the cases upon which we base this Proposition of Law as 6 Sub-propositions of law covering the most recent decisions of the Supreme Court of the United States, the State of Alabama, and the Supreme Courts of other states. Our Composite Proposition of Law No. 1 is to the effect that:

> "The State Court's jurisdiction to enjoin trespasses by a labor union even in connection with a labor dispute has not been pre-empted by acts of Congress or decisions of the Supreme Court of the United States."

In support of this proposition of law we should now like to examine our 6 Sub-propositions of Law and we refer the

court's attention to our Sub-proposition of Law No. A in support of Proposition of Law No. 1 under which we cite the cases of *Garner* v. *Teamsters, etc., Union*, 346 U.S. 486, 74 S.Ct. 161, 98 L.Ed. 228, and *International Brotherhood of Teamsters Local 695, AFL,* v. *Vogt, Inc.*, (1957) 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347.

First we refer the court's attention to the case of *Garner* v. *Teamsters, etc., Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, where we find the following language:

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."

In the later case, which summarizes a number of prior Supreme Court decisions, of *International Brotherhood of Teamsters Local 695, AFL,* v. *Vogt, Inc.*, (1957) 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347, Mr. Justice Frankfurter says on page 291 of 354 U.S. or at page 1169 of 77 Supreme Court Reporter the following:

> "The implied reassessments of the broad language of the Thornhill case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid State policy in a domain open to State regulation."

Based upon these two quoted statements we submit that our Sub-proposition of Law No. A to the effect that the National Labor Management Relations Act has not preempted the entire field of labor relations and much is left to the States is a correct proposition of law.

Our Proposition of Law No. B in support of Proposition of Law 1 is taken from the statement last hereinabove quoted from Vogt. In this regard we would also like to refer the court's attention to the case, *Hughes* v. *S. Ct. of Calif.*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985, and to the following statement appearing on page 992 of 94 Law Edition:

> "However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * * A State is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."

This brings us to a consideration next to the question of whether or not a trespass is an unfair labor practice under the National Labor Management Act. We find one case which has specifically construed this question and has arrived at the conclusion that picketing which constitutes a trespass is not an unfair labor practice under the National Labor Management Act. We refer the court's attention to the District Court decision of *Your Food Stores* v. *Retail Clerks Local 1564*, 124 F. Supp. 697, where the court said at page 700 of 124 Federal Supplement that the second question involved for decision was

> "Second, is the matter of trespass by Unions, not enumerated as an unfair labor practice in either Section 158, Title 29, U.S.C.A., or in any other section of the Labor Management Act, subject to litigation in the State Court?"

On page 701 the court said as follows:

> "Turning to the second question, we must first determine whether picketing, as a trespass, is an unfair labor practice within the ambit of the Act. A word-by-word examination of Section 158, Title 29, U.S.C.A., 'Unfair labor practices', fails to disclose that picketing, as a trespass is an unfair labor practice. Not being listed as such, the question remains as to whether picketing is a trespass, and whether it may be enjoined as such, and should be the subject of adjudication by the state court.
>
> "This question is, the Court believes, one of the first impression, as no cases in direct point were cited by parties, and none has been found by the Court. Certain enunciations have been made in cases which throw considerable light on the question, however.
>
> "In *United Construction Workers Affiliated with United Mine Workers of America* v. *Laburnum Construction Company*, 347 U.S. 656, 657, 74 S.Ct. 833, it was decided that the Labor Management Relations Act did not deprive a State Court of jurisdiction to try a case filed for damages against three labor unions in a common-law tort action. In that case, the action relied on as having been committed by defendants, were also unfair labor practices within the Act. The alleged trespass in the instant case is likewise a tort, and is not an enumerated unfair labor practice.
>
> "The case of *Garner* v. *Teamsters, etc., Union*, 346 U.S. 485, 74 S.Ct. 161, while fully supporting the previous opinion and judgment in the case at bar, contains the following language, to the effect that the Act has not pre-empted for the Board, the entire field of employer-employee relations in commerce:
>
> > " 'The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting

indications of congressional will the area in which state action is still permissible.

" 'This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is "governable by the State or it is entirely ungoverned." In such cases we have declined to find an implied exclusion of state powers. International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 254, 69 S.Ct. 516, 521, 93 L.Ed. 651. Nor is this case of mass picketing, threatening of employees, obstructing streets and highway, or picketing homes. We have held that the state still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways." Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740, 749, 62 S.Ct. 820. 825, 86 L.Ed. 1154." 346 U.S. at page 488, 74 S.Ct. at page 164.'

"A case which points strongly to the conclusion that plaintiff Food Stores may litigate its issues in the state court, is that of International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S.Ct. 516, 521, 93 L.Ed. 651. Here negotiations between the employer, Briggs & Stratton Mfrg. Co., and the union on a collective bargaining agreement, became deadlocked. The union, instead of striking, called a series of unannounced union meetings at different hours of the day. Twenty-seven stoppages in five months, in fact, occurred. The Supreme Court of Wisconsin sustained the Wisconsin Board's 'cease and desist order' to the union on certiorari to the Supreme Court. That tribunal, through Mr. Justice Jackson, affirmed the Wisconsin Court. Two excerpts from the opinion of the Supreme Court are of value, here:

> "It seems to us clear that this case falls within the rule announced in Allen-Bradley that the state may police these strike activities as it could police the strike activities there, because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the Federal Board.' There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned.
>
> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effect on that interstate commerce which Congress may regulate. National. Labor Relations Board v. Jones & Laughlin. 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893; Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234."

In the case of *Local 612 International Brotherhood of Teamsters* v. *Bowman Transportation, Inc.*, 165 So.2d 113, 115 the court says under Headnote 3:

> "Peaceful picketing is not to be enjoined in Alabama *unless it is done in an unlawful manner* or for an unlawful purpose."

We have paraphrased this statement to get our subproposition D in support of our Proposition of Law No. 1 to the effect that where peaceful picketing is done in an unlawful manner it may be enjoined.

Next we should like to refer the court's attention to our Sub-proposition of Law E in support of our Proposition of Law No. 1 wherein we state:

> "As recently as 1957 the United States Supreme Court did not consider that Federal laws pre-empted the field of law involving labor activities by Labor Unions so as to include the field of trespass."

This Proposition of Law is based upon the statement of the Supreme Court in *Amalgamated Meatcutters & Butchers Workmen of North America* v. *Fairlawn Meats*, 353 U.S. 20, 77 S.Ct. 604, 1 L.Ed.2d 613, page 616, where the court states:

> "One final point remains to be considered. At two of respondent's stores, located in suburban shopping centers, the picketing occurred on land owned by or leased to respondent though open to the public for access to the stores. As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact, and 'trespassing upon plaintiff's property' is one of the activities specifically enjoined. Whether a State may frame and enforce an injunction aimed narrowly at a trespass of this sort is a question that is not here. Here the unitary judgment of the Ohio court was based on the erroneous promise that it had power to reach the union's conduct in its entirety. Whether its conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know."

The Supreme Court went on to reverse the lower court but instead of rendering the decision remanded the case for further proceedings in the lower court. Apparently this action was taken for the lower court to determine whether or not it should narrowly enjoin the activity of trespass as otherwise the Supreme Court would have rendered the decision. This conclusion is reached because otherwise

there would have been no point in remanding the case to the State Court for further proceedings. Not only is this our conclusion from the above statement but we should also like to refer the court's attention to a statement of the Wisconsin Supreme Court in the case of *Moreland Corporation* v. *Retail Store Employees Union, Local No. 444*, (1962) 16 Wis.2d 499, 114 N.W.2d 876, 878, where the court said as follows:

> "However, we are of the opinion that the circuit court does have subject matter jurisdiction and may enter a valid judgment determining the controversy. Even assuming the presence of the necessary federal jurisdictional requirements, the question of whether a state court may enjoin picketing as a trespass, in spite of arguable federal labor law pre-emption in other respects, has been expressly left open by the United States Supreme Court. Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL v. Fairlawn Meats, Inc. (1957), 353 U.S. 20, 77 S.Ct. 604, 1 L.Ed.2d 613. We conclude that the courts of Wisconsin do have subject matter jurisdiction to determine a controversy involving an alleged trespass by agents of a labor union."

This statement of the Wisconsin Supreme Court is quoted on page 770 of the opinion of the Supreme Court of Tennessee in *Hood* v. *Stafford*, 378 S.W.2d 766, 770. This statement is likewise made in *Freeman* v. *Retail Clerks Union*, 45 LRRM 2334, 2335. The Washington Superior Court, King County, makes the following statement on page 2335 of 45 LRRM:

> "Amalgamated Meatcutters & Butcher Workmen of North America v. Fairlawn Meats, 353 U.S. 20, 1 L.Ed.2d 613, 39 LRRM 2571, stands for the proposition that the United States Supreme Court as recently as March 25, 1957, did not consider that Federal laws preempted the field of law involving labor activities by

labor unions so as to include the issue of trespass. In the absence of a clear judicial determination that such matters are specifically delegated to the Federal government, the plain language meaning of the Tenth Amendment to the United States Constitution controls. Residual judicial powers belong to the people or to the states and their duly-constituted state courts.

"POWERS RESERVED TO STATES OR PEOPLE. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Our Sub-proposition of Law F which is our last sub-proposition in support of our Proposition of Law No. 1 is based upon the following statement on page 768 of 378 S.W.2d Reporter, in the case of *Hood* v. *Stafford* where the court quotes from the Court of Appeals of the State of Tennessee's decision as follows:

"Neither the decisions of the Supreme Court of the United States nor the Acts of Congress, have, in our opinion, however, *undertaken to* authorize, even in labor disputes, trespassing on private property."

To like effect is the ruling of the Wisconsin Supreme Court in *Moreland Corporation* v. *Retail Store Employees Union, Local 444*, (1962) 16 Wis.2d 499, 114 N.W.2d 876. To the same effect is *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 685 (100 L.Ed. 975). See also *People* v. *Goduto*, 21 Ill.2d 605, 174 N.E.2d 385.

Based upon the foregoing authorities we submit that our Proposition of Law No. 1 correctly states the law that a state court does have the jurisdiction to enjoin trespasses by a labor union even in connection with a labor dispute, and that such power has not been pre-empted by Acts of Congress or decisions of the Supreme Court of the United States.

Our Proposition of Law No. 2 is based upon the statement in *Hood v. Stafford*, quoting from the Court of Appeals of Tennessee decision at page 769 of 378 S.W.2d Reporter as follows:

> "As to the contention that the parking lot of the Pic-Pac Stores was a quasi public place, it is our opinion that Pic-Pac had invited all members of the public, who were or might be customers of its store, to use its parking lot in connection with business transactions at the store; but, certainly, it had not invited appellee on to its premises, either expressly or impliedly, for the purpose of preventing members of the public from trading with Pic-Pac. The purpose of the implied invitation to the public for use of that lot was for acquiring customers, not for having them enticed away."

It would therefore follow that the property involved was properly subject to trespass by the Union in question.

Our Proposition of Law No. 3 to the effect that:

> "Picketing is not synonymous with free speech and it is subject to regulation by the state if the manner in which it is conducted gives grounds for its disallowance"

is taken from the case of *Hughes v. Superior Court of California*, supra, and the statement upon which this Proposition of Law is based is heretofore quoted in this brief. Appellee therefore submits that the Circuit Court of Mobile County, Alabama, properly had jurisdiction to issue the temporary Writ of Injunction in this matter. We submit that this right has not been pre-empted by decisions of the Supreme Court nor Acts of Congress, nor the constitutional guarantee of free speech.

The only possible questions remaining for this Court to determine are covered by our Propositions of Law Nos. 4 and 5. Our Proposition of Law No. 4 is to the effect

that the courts of the State of Alabama have the right in the exercise of their sound discretion to enjoin repeated or continuing trespasses to land which cause irreparable harm or where the damage sustained thereby is difficult to ascertain. This Proposition is taken from the case of *Lewis v. Hicks*, 264 Ala. 440, 87 So.2d 867, 60 A.L.R.2d 307 (and see cases cited in A.L.R.2d Annotations from Alabama). Our Proposition of Law No. 5 is taken from the Supreme Court of Alabama case of *Prichard v. Wade*, 261 Ala. 156, 73 So.2d 533, where the court says at page 537 of 73 So.2d Reporter and the Headnotes 4 and 5 as follows:

> "4, 5 As a general rule, 'an injunction, whether temporary or permanent cannot . . . be sought as a matter of right, but the power to grant or refuse it lies in the sound discretion of the Court under the circumstances and the facts of the particular case * * *.' 43 C.J.S., Injunctions, § 14, p. 420; Corte v. State, 259 Ala. 536, 542, 67 So.2d 782, 787; City of Mobile v. Farrell, 229 Ala. 583, 587, 158 So. 539. And in the absence of an abuse of discretion the action of the trial court will not be disturbed on appeal."

We therefore respectfully submit that the issuance of the temporary injunction in this case was within the jurisdiction of the Circuit Court of Mobile County, Alabama, and was within the sound discretion of the trial court who properly and lawfully exercised its sound discretion and enjoined trespassing by the Respondents in this case.

Since the order of the court denying the Motion to Dissolve and Dismiss the plaintiff's verified Bill of Complaint the defendants have continued to picket peacefully on the public sidewalks abutting on both sides of the subject property. The injunction in this case therefore in no way restricts the right of appellants to peacefully picket on the public sidewalks abutting on both sides of the sub-

ject property. For the reasons submitted we respectfully submit that certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing brief has been served upon the attorneys of record for appellants.

This 21st day of July 1969.

EDWIN J. CURRAN, JR.
Of Counsel for Appellee